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Nos. 104 and 105

In the Supreme Court of the United States

OCTOBER TERM, 1932

BANKERS POCAHONTAS COAL COMPANY, PETITIONER
v.
DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

D. J. F. STROTHER, PETITIONER
v.
DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 49–57)[1] is reported in 18 B. T. A. 901. The opinion of the Circuit Court of Appeals (R. 119–134) is reported in 55 F. (2d) 626.

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[1] The record references are to the record in the *Bankers Pocahontas Coal Company case* (No. 104) unless otherwise indicated.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered in each case January 27, 1932. (R. 135–136; Strother R. 111.) A petition of the petitioners for a rehearing covering both cases was presented February 26, 1932. (R. 137–167; Strother R. 112–138.) A petition of the respondent for a rehearing in the *Strother case* was presented February 26, 1932. (Strother R. 139–141.) Both petitions were denied by an order entered March 7, 1932. (R. 169–170; Strother R. 141–142.) By leave of court, the petitioners filed a supplemental petition for rehearing on April 12, 1932. (R. 171–183; Strother R. 143–153.) The supplemental petition for rehearing was denied April 29, 1932. (R. 185; Strother R. 154.) The petition for certiorari was filed May 23, 1932, and was granted October 10, 1932. (R. 187.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether royalties received by the petitioner, Bankers Pocahontas Coal Company, under certain instruments made prior to March 1, 1913, are taxable income.

2. Whether a judgment against a Collector of Internal Revenue in an action brought by petitioner in a United States District Court, involving taxes for other taxable years than those in the present

case, is *res judicata* of the issue of the proper depletion rate.

3. Whether the Board of Tax Appeals should have granted a rehearing upon evidence presented by petitioners for the first time upon final settlement of the deficiency, and if so, whether the corporate petitioner was entitled to a further allowance for depletion?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are contained in the Appendix, *infra,* pp. 34–43.

STATEMENT

The respondent determined deficiencies in income and profits taxes of the petitioner Bankers Pocahontas Coal Company for the years 1920 to 1926, inclusive, amounting to $39,851.99 (R. 12, 23, 29), and in income taxes of the petitioner Strother for the years 1919 to 1925, inclusive, amounting to $8,874.50 (Strother R. 11, 17, 23). The petitioners appealed from these determinations to the Board of Tax Appeals.

The material facts as found by the Board may be summarized as follows (R. 39–49):

The petitioner Bankers Pocahontas Coal Company (hereafter called the Coal Company) is a West Virginia corporation formed in 1912. In that year it acquired in fee 6,200 acres of land in West Virginia, including the mineral rights therein. Also, by assignment, it acquired and holds the interest of the prior owners in certain contracts

of lease executed in 1901 and 1902 with several coal operating companies, to which the tract of land was subject. By these contracts the prior owners did "demise, let and lease for coal mining and coal coking purposes only" for the period of thirty years to the coal operating companies, severally, certain parts of the tract. The form of contract used was that prevailing in the West Virginia coal fields, and followed the form used in the State of Pennsylvania. (R. 39–40.) Extracts from a typical contract appear at R. pp. 40–42. The cost to the Coal Company of the properties was between $407,000 and $507,000. (R. 42.)

Schedules appearing in the findings of fact (R. 43–46) contain a list of the contracts and show the estimated recoverable coal on March 1, 1913, and the number of tons mined, the number of tons paid for, and the royalty receipts in the taxable years here in question, under each contract.

In these years the Coal Company was on a cash receipts and disbursements basis of accounting. Its income, except for minor items, consisted of payments received under these contracts. (R. 46.)

The respondent treated the income derived from the contracts as royalty payments under leases, and allowed the Coal Company, as lessor, a deduction for depletion at the rate of 3.6 cents per ton of coal mined. This is the rate that had been allowed by the respondent for 1919 and prior years. (R. 47–48.)

Additional taxes amounting to $6,267.08 were assessed and collected for the years 1914 to 1919, in-

clusive. In 1923 the Coal Company brought an action in the District Court for the Southern District of West Virginia against the collector of internal revenue to recover those taxes. The Coal Company contended that payments received by it under the contracts were proceeds of the sale of coal in place consummated before March 1, 1913, or of choses in action owned on that date and therefore not income; or, otherwise, that in computing net income it was entitled as lessor to a depletion rate of 5 cents per ton of coal mined. The court held that the receipts were income and found that the plaintiff was entitled to a depletion rate of 5 cents a ton, and entered judgment in its favor for $5,373.01, which was paid. The Collector of Internal Revenue, as defendant, was represented in that action by the United States Attorney and the Solicitor of Internal Revenue (now General Counsel of the Bureau of Internal Revenue). (R. 47.)

In the several years here involved the petitioner Strother, as a stockholder, received payments from the Coal Company. He reported them in his income tax returns but did not include them as taxable income. The Coal Company used such portion of the royalty payments as was necessary for ordinary and necessary expenses, set aside a reserve to meet pending Federal taxes, and distributed the balance to its stockholders. The respondent added the entire amount thus distributed to Strother to his net income without allowance for any part thereof that might have come out of the depletion

reserve of the Coal Company. Deficiencies against Strother were determined by the respondent accordingly. (R. 72–73.)

In the case of the Coal Company, the Board of Tax Appeals held that the payments received by the petitioner under the contracts were royalties which were properly part of its gross income; that it was entitled to a reasonable allowance for depletion, and that the petitioner had failed to prove that the allowance determined by the respondent of 3.6 cents per ton was not reasonable. (R. 51, 54.) On February 27, 1930, the Coal Company filed with the Board a motion for a rehearing and alleged as error, among others, that the Board had failed to hold that the decision in the case of this petitioner against the Collector of Internal Revenue, in the United States District Court for the Southern District of West Virginia, was *res judicata* of the issue with respect to the depletion rate. (R. 57–59.) The motion was denied. (R. 59–60.) Upon final settlement of the amount of deficiencies under the Board's decision, petitioner filed objections to the proposed determinations submitted by respondent and presented counter proposed determinations. The Coal Company therein contended for the first time that the depletion allowance should be on the basis of the minimum royalty payments and not upon the tonnage of coal mined, where the latter was less than was permitted to be mined for the minimum royalty payment in any year. (R. 66–

69.) At the oral hearing on final settlement, a motion was made on behalf of both petitioners for a rehearing to enable them to offer additional evidence for the purpose of raising this question, and the Board denied the motion. (R. 69–70, 109–110.) The Board thereupon entered its order in the *Coal Company case* redetermining the deficiencies in the aggregate amount of $39,171.05. (R. 70–71.) The Circuit Court of Appeals sustained the decision of the Board on all of the above issues.[2]

In the *Strother case,* before the Board, it was agreed between the parties that the distributions received by Strother were nontaxable to the extent that they came out of the depletion reserve of the Coal Company. (R. 57.) The respondent thereupon filed a proposed settlement of the amount of the deficiencies. (Strother R. 49–56.) The petitioner Strother filed objections and a counter proposal alleging error, among others, in the respondent's computation in that it did not accord with the allowances for depletion made to the Coal Company. (Strother R. 57–63, 64–70.) After oral hearing (Strother R. 81–87) the Board adopted the computations of the respondent and entered its order redetermining deficiencies aggregating $5,806.07 and an overassessment for the year 1924 to be abated in the amount of $36.38. (Strother R. 71–72.) The Circuit Court of Appeals decided

[2] There were certain other issues before the Board and the Circuit Court in the *Coal Company case* which are not involved in the present petition.

Strother should be given an opportunity to introduce additional testimony on the issues raised by him on the hearing on final settlement, and it remanded this case for further proceedings in accordance with its opinion in the *Coal Company case*. (Strother R. 110.) As it was stipulated that decision in the *Strother case* should follow that in the *Coal Company case* as to the issues now presented (Strother R. 80) no further separate discussion of that case seems to be necessary.

SUMMARY OF ARGUMENT

1. Royalties received from a lessee of coal lands in West Virginia, upon leases made prior to the enactment of the Sixteenth Amendment, constitute gross income. To impose a tax upon such receipts does not violate the Constitution of the United States as being an unapportioned direct tax.

It is clear from the comprehensive definition of gross income contained in the Revenue Acts, and the decisions of this Court and of Circuit Courts of Appeals with respect thereto, that Congress intended to tax such income.

It is immaterial that, as assumed by the court below for the purposes of the present case, such leases are construed by the courts of West Virginia as effecting a sale of the mineral in place. The royalties received from such leases are nevertheless taxable under the Federal statute, subject only to an allowance for depletion. Furthermore,

an examination of the decisions of the highest court of West Virginia shows that the decisions are not uniform, and that there is doubt whether this is the established law of that State. Whatever may be the legal effect of these instruments under the State law, the royalties received thereunder are properly gross income under the provisions of the Revenue Act and the decisions of this Court.

2. The judgment of the District Court in the action by the Coal Company against the Collector of Internal Revenue, in an action involving taxes for different taxable years from those involved here, is not *res judicata* of the issue of the correct depletion rate. That rule has no application to a case like this where the parties are different, different causes of action or rights are involved, and the statute expressly authorizes maintenance of a new suit for each taxable year.

3. There is no error in the ruling of the court below sustaining the Board of Tax Appeals in its refusal to receive evidence first offered at the hearing on recomputation of the tax under Rule 50 of the Board on an issue not raised in the pleadings or presented at the hearing on the merits. Denial of such rehearing was proper under the rule of the Board relating to hearings for final settlement. That rule is valid and the denial was also a proper exercise of discretion.

Petitioner's contentions thus advanced too late were that the depletion allowance should be based

upon the minimum annual royalties instead of upon the number of tons of coal actually extracted, where the minimum annual payments exceed the royalties, at the per ton rate on coal extracted. But the right of the lessees to mine coal to offset the excess of royalty paid in any year was limited to the next succeeding year after the amount necessary to produce the minimum royalty for that year had been mined. The present case, therefore, is not within the terms of the Treasury regulations providing that advance royalties are subject to depletion allowance. But from facts found by the Board of Tax Appeals it appears that royalty payments on coal extracted exceeded the required minimum annual payments—with a possible exception in the case of one lease, depending upon a particular construction of the facts. Even if that construction of the facts should be adopted, it will appear that in only three years was there a deficiency in coal mined, and as to only one of those years was the deficiency offset in part in the next year. Hence, if it should be held that the principle of the regulations should be applied in the present case, there would be no substantial change in the result, for the Coal Company will be required to restore to capital account and to report as income in the succeeding year any excess of depletion allowed in the preceding year.

ARGUMENT

I

ROYALTIES RECEIVED BY PETITIONER BANKERS POCAHONTAS COAL COMPANY UNDER THE LEASE AGREEMENTS ARE TAXABLE INCOME

The Circuit Court of Appeals held that, even though the instruments here in question are construed under the law of West Virginia as effecting a sale of coal in place, the per ton royalty payments or the annual minimum rental payments provided for therein constitute gross income to the Coal Company. Petitioners' contention seems to be, first, that the decision violates Article 1, Sec. 9, Clause 4, of the Constitution in that it authorizes a direct tax upon property without apportionment, i. e., upon the proceeds of a sale of property made prior to the effective date of the Amendment,[3] and next, that Congress did not intend to tax such receipts.

We submit that both of these contentions have been fully answered by previous decisions of this Court. In *Stanton* v. *Baltic Mining Co.*, 240 U. S.

[3] It appears from the statement of petitioners' counsel in connection with petitioners' motion for a rehearing (discussed under Point III of this brief), that in the case of two of the leases new instruments were executed after March 1, 1913, to wit, September 30, 1916, and January 1, 1918, "each reciting the pre-existence of contracts on March 1, 1913, and the subsequent adjustment and modification of same as to payments of a minimum royalty * * *." (R. 109, 110.)

103, which arose under the income-tax provisions of the Tariff Act of 1913, c. 16, Sec. 2, 38 Stat. 166, 181, it was contended that the proceeds of mining without an adequate allowance by way of deduction for exhaustion of the ore body was a tax upon property because of its ownership and therefore subject to the constitutional requirement of apportionment. Of this contention, this Court said (pp. 113–114):

> It moreover rests upon the wholly fallacious assumption that looked at from the point of view of substance a tax on the product of a mine is necessarily in its essence and nature in every case a direct tax on property because of its ownership unless adequate allowance be made for the exhaustion of the ore body to result from working the mine. We say wholly fallacious assumption because independently of the effect of the operation of the Sixteenth Amendment it was settled in *Stratton's Independence* v. *Howbert,* 231 U. S. 399, that such a tax is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations (pp. 413 *et seq.*). (Citing *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1.)

That case and *Stratton's Independence, Limited,* v. *Howbert,* 231 U. S. 399, involved the proceeds of ore mined by a corporation from its own premises. *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503, involved moneys received from lessees under in-

struments which were in form mining leases for terms of fifty years. The question was whether the receipts were income under the corporation excise tax provisions of the Tariff Act of 1909, c. 6, 36 Stat. 11, 12. This Court decided, on the principles announced in the *Baltic Mining Co.* and *Stratton's Independence cases, supra*, that the royalties received under the leases were income, and it referred to its holding in the *Stratton's Independence case* that the process of mining is in a sense equivalent to a manufacturing process, and that however the operation is described it is indubitably business and the gains derived from it are properly income derived from capital, from labor, or from both combined. This Court also held that it made no difference whether the ores were extracted by the mine owner, as in the *Stratton's Independence case,* or by a lessee of the owner, as in the case of the *Sargent Land Company.* (p. 521.) See also *United States* v. *Biwabik Mining Co.,* 247 U. S. 116; *Lynch, Executrix,* v. *Alworth-Stephens Co.,* 267 U. S. 364.

The case of *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, is not in point, as the question there was whether a *pro rata* part of premiums received upon the sale of the petitioner's bonds prior to 1913 should be included in gross income of 1921 or should reduce the item of interest paid which is permitted as a deduction from gross income. The holding of

this Court was that such premium is income for the year in which it was received, and no part thereof could be income for any other year. In the case at bar, while the instruments in question were entered into prior to the adoption of the Sixteenth Amendment, at that time the Coal Company was the owner of the right to receive royalties as stipulated in the instruments and to regain possession when the leases terminated. The situation of the Coal Company is precisely like that of the respondent in *Reinecke* v. *Spalding,* 280 U. S. 227. In that case the respondent received royalties under leases made prior to 1913, and the effect of this Court's decision is that the royalties received are income against which the taxpayer is entitled to deduct as depletion the per unit value on March 1, 1913, of the right to receive the royalties.

In view of the comprehensive definition of gross income contained in Section 213 (a) of the relevant Revenue Acts (*infra,* p. 34), and the decisions of this Court, there would seem to be no doubt that Congress intended to tax such income. See *Burnet* v. *Harmel,* No. 26, October Term, 1932, decided November 7, 1932; *Hirschi* v. *United States,* 67 C. Cls. 637, certiorari denied, 280 U. S. 576; *Rosenberger* v. *McCaughn,* 25 F. (2d) 699 (C. C. A. 3d), certiorari denied, 278 U. S. 604; *Alexander* v. *King,* 46 F. (2d) 235 (C. C. A. 10th), certiorari denied, 283 U. S. 845; *Ferguson* v. *Commissioner,* 45 F. (2d) 573 (C. C. A. 5th); *Berg* v. *Commissioner,* 33

F. (2d) 641 (App. D. C.), certiorari denied, 280 U. S. 598; *Burkett* v. *Commissioner,* 31 F. (2d) 667 (C. C. A. 8th), certiorari denied, 280 U. S. 565.

The *Rosenberger case, supra,* involved the question whether royalty payments under a lease of Pennsylvania coal lands similar to the leases involved in the instant case were taxable income. The Circuit Court of Appeals held that they were, although it recognized that under Pennsylvania law such leases constitute a sale of coal in place. The later decision of the Circuit Court of Appeals for the Third Circuit in *Jefferson Gas Coal Co.* v. *Commissioner,* 52 F. (2d) 120, is not to the contrary. The question there was the right of the petitioner to deduct from income, payments made under an agreement called a " lease " entered into in 1920 and providing for the payment of a certain rate per ton for coal mined or minimum annual payments over a period of ten years. The coal mined in the first three years was considerably less than would, at the per ton rate, equal the minimum payments. The court held that the petitioner could deduct only the amount of the royalty rate on the coal mined and not the total amount of the minimum payments, because the agreement provided that whenever the total payments made equalled the aggregate of the minimum annual royalty payments for ten years the petitioner was entitled to a deed in fee simple, free of encumbrances, for all of the

unmined coal in the lands in question. The instrument was held to be a contract of sale, and the minimum payments were held to be payments on the purchase price and hence capital expenditures. The cases are plainly distinguishable.

The present case is also distinguishable from *Burnet* v. *Logan,* 283 U. S. 404, as that case involved the calculation of gain on the sale of stock, and this Court expressly observed that it was not dealing with royalties or deductions from gross income because of depletion of mining property. (P. 412.)

The Circuit Court of Appeals assumed for the purposes of its decision herein, that under the law of West Virginia a mining lease constituted a sale of the mineral in place, and it held that nevertheless the royalties in question were taxable income (R. pp. 123–124), since the power of Congress to tax their receipt was not limited by the construction placed upon such instruments by the state courts. The view taken by the court below is sustained by the decision of this Court in *Burnet* v. *Harmel, supra,* decided November 7, 1932. In that case this Court held that a bonus received in connection with a lease of oil lands in Texas was taxable as ordinary income and not as a gain from the sale of capital assets. This Court said:

> Bonus and royalties are both consideration for the lease and are income of the lessor.

The Court held that the fact that leases of oil lands were regarded by the Texas courts as sales of oil in place did not affect the nature of bonuses as ordinary income under the Federal Revenue Acts. We believe that this decision practically disposes of this branch of the case.

Although the court below assumed that the instruments involved would be held under the state law to convey title to the mineral in place, an examination of the decisions of the Supreme Court of Appeals of West Virginia indicates that this is not the established law, or at least that the state decisions are not uniform on the point.

In *Coal & Coke Co.* v. *Tax Commissioner,* 59 W. Va. 605, the court, in applying a West Virginia statute which provided for the taxation of personal property, held that a mining lease, similar in all substantial respects to the instruments involved in the present case, was a chattel real taxable to the lessee as personalty. The lessee had contended that the deed amounted to a sale of the coal in place, taxable only as realty. The court said (p. 611):

> Try this property or right under these definitions. It is surely a lease, and therefore a chattel real. The fee owner carves out of his fee a particular estate and vests it in another. The coal having been developed, then, if not before, an actual estate vested as to the coal right, an entity, a distinct entity, a separate property from that

> remaining in the lessor. The instrument of conveyance gave certain title to the Coal Company, gave it an intangible right, that is, a right to produce personal property, a product of the land. This right savored of the realty, depended on it, was annexed to it, and so far answers the definition of a chattel real, which is personal estate. We say that the estate of the coal company is a lease for years, and if so, by all authority, is a chattel real. The parties thought they were making a lease for years, intended to do so, so far as we may judge from legal language, for they used the words of lease signification, "demise, lease, and let." The instrument calls itself a lease and calls the parties lessor and lessee. But take the document itself. It leases the tract for "a period of thirty years," not forever. It has a specific term, gives an estate less than the fee of the lessors, leaving the whole tract at the end of the term to revert to the lessors disencumbered and freed from the leasehold estate, thus meeting another element in the definition of a chattel real, that is, that it must be of less duration than the estate of the lessor. * * *

Expressions in *National Coal Co.* v. *Overholt,* 81 W. Va. 427, to the effect that the instrument there involved constituted a sale of coal in place do not seem to have been strictly necessary to decision, but in any event were based upon a construction of the particular instrument. Cf. *Taylor* v. *Thomas,* 106 W. Va. 376, and *Feather* v. *Baird,* 85 W. Va. 267.

Urpman v. *Lowther Oil Co.*, 53 W. Va. 501; *Toothman* v. *Courtney*, 62 W. Va. 167; *Smith* v. *Root*, 66 W. Va. 633.

We believe it can not be said that it is the established law of West Virginia that instruments such as these involved in the case at bar convey title to the mineral in place. But we submit that in any view of the legal effect of these instruments under state law, the royalties received by the Coal Company were properly included in gross income.

II

THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA IN THE CASE OF BANKERS POCAHONTAS COAL COMPANY V. WHITE, COLLECTOR, IS NOT RES JUDICATA OF THE ISSUE IN THE CASE AT BAR OF THE REASONABLE DEPLETION RATE

The case of *Bankers Pocahontas Coal Co.* v. *White, Collector,* involved the depletion allowance of petitioner for the years from 1914 to 1919, inclusive. (R. 89.) The District Court allowed a depletion rate of 5 cents a ton. (R. 95.) The present proceeding relates to the years 1920 to 1926, inclusive. (R. 38.) The respondent determined that 3.6 cents per ton was a proper depletion rate for these years, and the Board of Tax Appeals held that the Coal Company had failed to prove that this rate was erroneous. (R. 53–54.) The court below sustained the Board. (R. 127–128.) The Coal Company contends that the rate of deple-

tion allowed by the District Court for prior years in an action brought by it against the Collector of Internal Revenue is *res judicata* of the issue of depletion in the instant case. We submit that the doctrine is not applicable because the parties are different, different causes of action or rights are involved, and separate suits or proceedings are specifically authorized by statute. We assume for the purpose of the argument that the fact that the judgment is pleaded in the Board of Tax Appeals and not in a court is not material.

The present proceeding is in effect a proceeding against the United States. While the Commissioner of Internal Revenue is the nominal party, he is proceeded against in his official and representative capacity as an officer of the United States, which is the real party in interest; it is the United States which will be concluded by any decision adverse to the Commissioner. The proceeding is brought with its consent to review a determination of the Commissioner that the taxpayer is indebted to the United States for additional taxes. On the other hand, the suit in the District Court was against the Collector of Internal Revenue. In *Sage* v. *United States,* 250 U. S. 33, this Court held that the United States was not privy to a judgment against a collector of internal revenue, and that the judgment was not a bar in a suit brought against the United States in the Court of Claims involving a part of the same tax. In that case, this Court pointed out that the suit against the collector is

personal and its incidents are different. We believe that the petitioners' argument that the Commissioner is privy to the suit against the collector is fully answered by what this Court said in the *Sage case, supra,* which the court below accepted as controlling upon this question. That case was cited with approval by this Court in *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 430. See also *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1, 4, 5. Cf. *Union Trust Co.* v. *Wardell,* 258 U. S. 537.

The present action relates to taxes for different years from those involved in the suit in the District Court. A taxpayer is authorized to bring a proceeding for review to the Board of Tax Appeals in any case of a deficiency in tax found by the Commissioner. The Board was created to provide taxpayers an opportunity to secure an "independent review" of the Commissioner's determination. It is authorized to consider deficiencies beyond those stated by the Commissioner in his notice to the taxpayer and may also determine that the taxpayer has made an overpayment. Upon the Board's decision, "the parties are given an opportunity to base a petition for review to the courts." *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 721, 722, 725. Section 274 (a), Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Sec. 1048.)[4] By Section 3226 of the Revised Statutes

[4] See also Section 250, Revenue Act of 1921, c. 136, 42 Stat. 227; Section 274, Revenue Act of 1924, c. 234, 43 Stat. 253 (U. S. C., Title 26, Sec. 1048).

(as amended by Section 1113 (a) of the Revenue Act of 1926 (U. S. C. App., Title 26, Sec. 156),[5] a taxpayer is authorized to maintain a suit for the recovery of *any* internal revenue tax alleged to have been erroneously assessed or collected, after certain prerequisites, such as claim for refund to the Commissioner, have been complied with. In view of these provisions, it may not be said that a judgment as to one taxable year is intended to be a bar to an action involving a tax for a different year.

Each year is treated as a unit (*Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359), and the procedure to collect, as well as the procedure to recover, must be followed with respect to each year in controversy. The statutes authorize suits with respect to one year's tax irrespective of the status of another year's tax. It has never been supposed that a decision upon a tax question was forever binding between the parties.[6]

This Court has held that where cumulative remedies are given by statute the doctrine of *res judicata* is not a bar to a second suit. *United States*

[5] See also Section 1318, Revenue Act of 1921, c. 136, 42 Stat. 227 (U. S. C., Title 26, Sec. 156); Section 1014 (a), Revenue Act of 1924, c. 234, 43 Stat. 253 (U. S. C., Title 26, Sec. 156).

[6] For example, in *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, it appears that the question had been previously litigated between the same parties. *Commissioner* v. *Old Colony R. R.*, 26 F. (2d) 408 (C. C. A. 1st), writ of certiorari dismissed, 279 U. S. 876; *Commissioner* v. *Old Colony R. Co.*, 50 F. (2d) 896 (C. C. A. 1st).

v. *Ness,* 245 U. S. 319. See also *Maney* v. *United States,* 278 U. S. 17, 23; *Tutun* v. *United States,* 270 U. S. 568, 580.

In *United States* v. *Stone & Downer Co.*, 274 U. S. 225, 230, it was taken as settled that the doctrine of *res judicata* may apply to cases of taxes as well as to other subjects of litigation, but the doctrine was not applied in that case for reasons which are equally pertinent here. That case dealt with the proper classification of an importation of wool for the purpose of applying the correct tariff rate. Although there had been a prior judgment by the Court of Customs Appeals applying one classification to the wool, that court had established the practice that a decision upon a finding of fact, a construction of the statute and classification thereunder, was not *res judicata* in respect of a subsequent importation.

The purpose of that practice was to avoid inequality and discrimination in the administration of the customs laws which would result from giving a permanently binding effect to a decision favorable to a particular importer. Much of this reasoning (pp. 235–237) is applicable to tax cases arising under the revenue laws, for it is apparent that the application of the doctrine would result in inequality in the administration of the revenue laws and give preference to those taxpayers who successfully litigated a tax question, over others who may be subject to tax liability as the result of a later deci-

sion of controlling authority laying down a different rule. For example, if the interpretation of the affiliation statutes by this Court in *Handy & Harman* v. *Burnet,* 284 U. S. 136, may not be applied to all corporations without regard to erroneous decisions granting affiliation in prior years, discrimination, injustice, and confusion will result. The startling results of such a rule can hardly be exaggerated. If any such rule should prevail the interests of the Government could not be adequately protected unless appeals were taken and writs issued by this Court to review every questionable decision in a Government tax case. For unless all such cases were brought to this Court there would be created a numerous class of taxpayers privileged in the permanent enjoyment of tax exemptions predicated upon the decisions of the lower Federal courts, later declared to be erroneous and overruled. Decisions of the courts in suits against a collector of taxes conclusively settle the validity of the tax collections in question. They should be given no wider scope. We submit that the principle laid down in *New Orleans* v. *Citizens' Bank,* 167 U. S. 371, should not be applied to tax cases involving different years for reasons similar to those which induced the Court not to apply it in the *Stone & Downer case* (p. 237).

The doctrine of *res judicata* has been applied in three recent cases in District Courts, but we believe that in each of those cases different situations were presented from that in the case at bar.

In *Second Nat. Bank* v. *Woodworth,* 54 F. (2d) 672 (E. D. Mich.), it was held that a judgment in favor of the United States in a suit based on rejection of a claim for refund of additional estate tax paid under protest was a bar to a subsequent suit against the Collector of Internal Revenue presenting the same issues. In that case attempt was made to relitigate questions as to the same tax. Similar situations were presented in *Greylock Mills* v. *White,* 55 F. (2d) 704 (Mass.), and in *Bertelsen* v. *White,* 58 F. (2d) 792 (Mass.).

We submit that for the reasons stated judgment of the District Court in the prior action was not a determination on the question of depletion which was binding in the present proceedings.

III

THERE WAS NO ERROR IN THE RULING OF THE LOWER COURT SUSTAINING THE BOARD OF TAX APPEALS IN ITS REFUSAL TO RECEIVE ADDITIONAL EVIDENCE AT THE HEARING UPON SETTLEMENT OF THE AMOUNT OF THE DEFICIENCY AND SUBSEQUENT TO PROMULGATION OF ITS FINDINGS OF FACT AND OPINION

After the Board of Tax Appeals had filed its findings of fact and opinion, the respondent and the petitioners each filed proposed recomputations of the amount of the deficiency under the Board's report. (R. 61–66, 66–69; Strother, 57–63.) These proposed recomputations were filed pursuant to Rule 50 of the Board's rules of practice (*infra,* p. 42). The petitioners, in their recomputations,

claimed that a greater quantity of coal was paid for than was mined, and that the depletion allowance should be computed on the basis of the amount of the payments received instead of upon the number of tons extracted. (R. 68; Strother 58.) At the hearing upon the recomputation under Rule 50, petitioners tendered evidence designed to support these claims. (R. 109–110; Strother 82, 86.) The question had not been raised previously in the pleadings nor at the hearing on the merits. That hearing was had in May, 1929. (R. 84.) The Board's findings and opinion were promulgated January 22, 1930. (R. 37.) Motion for a rehearing on this question was not made until May, 1930. (R. 66–69.) The Board denied the motion. (R. 69–70.) The Circuit Court of Appeals held that it was within the sound discretion of the Board to grant or to deny petitioners' motion; and that since the evidence must have been in the possession of the Coal Company from the beginning the court could not say that there had been an abuse of discretion. (R. 129.)

The Board is authorized to prescribe rules of practice and procedure for the conduct of proceedings before the Board. Section 601, Revenue Act of 1928, c. 852, 45 Stat. 791, 871–872 (U. S. C. Sup. V., Title 26, Sec. 1219 (a)), amending Section 907 (a) of the Revenue Act of 1924, as amended. See *Greengard* v. *Commissioner,* 29 F. (2d) 502, 503. (C. C. A. 7th). Cf. *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117.

Rule 50 of the Board prescribes the procedure for computing the amount of the deficiency after the Board has heard and decided the issues raised and presented on the merits. Under the express provisions of this rule any hearing thereunder is confined to consideration of the correct computation of the deficiency or overpayment resulting from the report of the Board already made, and no argument is heard or consideration given to any new issue. Furthermore, by its express provisions the rule may not be taken as affording an opportunity for a rehearing or consideration. (Rule 50, *infra*, p. 42.)

The Board has held that new issues may not be raised and urged on a hearing under this rule. *Great Northern Ry. Co.*, 10 B. T. A. 1347, affirmed on other issues, 40 F. (2d) 372 (C. C. A. 8th), certiorari denied, 282 U. S. 855. It has also been sustained in the following cases: *O'Meara* v. *Commissioner*, 34 F. (2d) 390, 395 (C. C. A. 10th); *Boggs & Buhl* v. *Commissioner*, 34 F. (2d) 859, 861 (C. C. A. 3d); *Metropolitan Business College* v. *Blair*, 24 F. (2d) 176, 178 (C. C. A. 7th). Cf. *Sooy* v. *Commissioner*, 40 F. (2d) 634 (C. C. A. 9th). The rule is clearly a proper exercise of the power of the Board to prescribe rules of practice and procedure. The interests of orderly procedure demanded that petitioners present their contentions before the Board decided the case on the merits and denial of rehearing by the Board was clearly proper.

The contention which the petitioner sought to advance on rehearing was that if the annual allowances to the Coal Company for depletion are based upon the minimum royalty payments instead of upon the number of tons actually extracted it will be entitled to a larger depletion deduction than that determined by the respondent and approved by the Board. The Coal Company seeks to bring itself within the rule that the Government is contending for in *Murphy Oil Co.* v. *Burnet,* No. 80, October Term, 1932, which is to be argued just before this case. In that case the taxpayer, a lessor of oil property, received a bonus in connection with a lease, in addition to regular royalties stipulated in the lease.[7] The Government is contending that the bonus should be reported as gross income and a depletion allowance made in the same year, the bonus being considered as advance royalty for oil which the lessee has acquired the right to remove in the future. In that case the Government is seeking to uphold Treasury Regulations, which provide in substance that bonuses and minimum annual or advance royalties which are paid for the right to extract and remove mineral at any time thereafter shall be included in gross income and an allowance made for depletion of the value in

[7] Reference is made to the Government's brief in *Murphy Oil Co.* v. *Burnet.*

the ground to the lessor of the number of units of mineral so paid for in advance, and no further depletion is thereafter allowed on account of the extraction of such mineral so paid for in advance.[8] The Regulations further provide that, upon expiration, termination, or abandonment of the lease, the lessor shall restore to capital account any depletion deduction made in prior years on account of royalties or minerals paid for but not removed, and the amount so restored shall be included as income for the year in which the lease expires, terminates, or is abandoned.

Upon the facts disclosed in the present record it appears that the right of the lessees of the Coal Company to remove coal for minimum royalties subsequent to the year of payment was limited. There were six different leases of the Coal Company's property. (R. 42–43.) Only one, known as the "Cletus lease," was received in evidence.[9] (R. 85, 39–42.) This lease was offered as typical of the others. (R. 39–40, 85–86.) It provides that the lessee shall, among other things, have the exclusive privilege of mining and coking coal. The les-

[8] This is in accordance with Article 215 of Regulations 45 (1920 Edition), Article 216 of Regulations 62, and Article 216 of Regulations 65, as amended by T. D. 3938, V–2 C. B. 117 (*infra*, p. 40).

[9] This Coal Company proffered the other leases upon the hearing under Rule 50, in connection with its motion for rehearing, but the Board refused to receive them then. (R. 109–110.)

see agrees to pay 10 cents for each ton of coal mined and 15 cents for each ton of coke manufactured, and to pay as a minimum rental or royalty, $5,000 a year, whether the quantity of coal mined and coke manufactured shall produce that amount of royalty or not, but the lessee "shall have the privilege of mining the *next succeeding year,* free of royalty, a sufficient amount of coal above the amount necessary to produce the minimum royalty for that year to reimburse themselves for the deficiency in the preceding year." (Italics ours.) (R. 40–41.)

It is clear from the provision quoted that the payment of the minimum annual rental or royalties did not give to the lessees a right to mine at any time in the future a quantity of coal equal to the deficiency in the year of payment. The right was limited to the next succeeding year, and then only after the minimum quantity for that year had been mined It is, therefore, not covered by the terms of Article 215 of the Treasury Regulations. There was no continuing right in the lessee to remove coal in the future equal to the excess of the minimum payment over the total royalty at the per-ton rate for coal extracted. If the principle of the Regulation were applied to a case like the present, and depletion allowed on the basis of the minimum annual payments and the deficiency in tons of coal mined should not be removed in the following year, it would be necessary under the terms of the Regula-

tion to restore the excess depletion to capital account and to report it in income in the next succeeding year. Otherwise, the lessor would have been allowed depletion of his interest in the minerals where no depletion had taken place, either in fact or in theory.

But it appears from facts stipulated and found by the Board of Tax Appeals that the royalty payments on coal actually extracted was greater than the required annual minimum payments (except possibly for certain years in the case of one of the leases, and this depends upon one construction of the facts, as shown below).[10]

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[10] These facts show:

Lease No. 1: Per ton royalty, 8 cents; annual minimum, $5,000. (R. 43.) In each year the tonnage mined and paid for exceeded the required minimum payment. (R. 44.)

Lease No. 2 (Cletus Mine): Per ton royalty, 10 cents; annual minimum, $5,000. (R. 41, 43.) The tonnage mined in each year was less than the annual payments actually received, which were uniformly $12,000. But the lease and the tabular statement in the finding of fact of the Board show that the required annual minimum payment is $5,000, and payments at the per ton rate for coal extracted in each year exceeded the latter amount. (R. 41, 43, 44.)

Lease No. 3: Per ton royalty, 7 cents; annual minimum, $4,000. (R. 43.) In each year the tonnage mined and paid for exceeded the required annual payment. (R. 45.)

Lease No. 4 (Warwick Mine and Exeter Mine): Per ton royalty, 10 cents; annual minimum, $10,000. (R. 43.) The amount mined and paid for at both mines always exceeded the annual minimum. If the minimum applies to each mine separately, in the case of the Warwick Mine there were three years in which the tonnage mined was less than the tonnage

From the references to the findings in Footnote 10, it is apparent that even if the Regulations were held to apply to leases with provisions for a very limited right of extraction to compensate for minimum royalty paid in excess of extraction, the facts disclose that there were no excess royalty payments under any of the leases, with one possible exception.[11]

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that could be mined for the annual payment, but in only one case (1922) was the deficiency in tonnage mined (in part) in the following year. (R. 45.)

Lease No. 5: No required annual minimum payment.

Lease No. 6: This lease relates to an easement for hauling over the land of the Coal Company coal mined on property of others. It does not appear that it is an appropriate subject for depletion allowances.

[11] Whether or not there were excess payments in the case of this lease depends upon a construction of the facts. If the stated minimum annual royalty of $10,000 was the minimum for both of the mines grouped under Lease No. 4, there was no excess payment of royalty. If $10,000 was to be paid separately for each of the two mines, then there was an excess payment in the case of the Warwick Mine in three of the seven years involved, viz, 1920, 1921, and 1925; but only in 1922 was any coal mined to make up in part the deficiency of the preceding year. In the case of the Exeter Mine, under Lease No. 4, the receipts in each year exceeded $10,000, although they can not be reconciled with the figures of tonnage mined. (R. 45.)

We, therefore, submit that upon the facts in evidence it appears that (with possibly a minor exception in the case of one lease) the Coal Company would not in any event be entitled to a larger depletion allowance than that made to it by respondent, and thus denial of rehearing did not substantially prejudice it.

CONCLUSION

It is submitted that the decision of the court below should be affirmed.

Respectfully submitted.

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NOVEMBER, 1932.

APPENDIX

Constitution of the United States:

Article I

SEC. 9. * * *

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Sixteenth Amendment

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1065, 1077:

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from * * *, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of

section 212, any such amounts are to be properly accounted for as of a different period; * * *

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(9) In the case of mines, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: * * * such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

Revenue Act of 1921, c. 136, 42 Stat. 227, 237, 254:

SEC. 213 of the 1921 Act is substantially the same as Section 213 of the Revenue Act of 1918.

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(9) In the case of mines, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not

otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: * * * such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

Revenue Act of 1924, c. 234, 43 Stat. 253, 267, 283:

SEC. 213 of the 1924 Act (U. S. C., Title 26, Sec. 954), is substantially the same as Section 213 of the Revenue Act of 1921.

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(8) In the case of mines, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee. (U. S. C., Title 26, Sec. 986.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 23, 41, 55, 116:

SEC. 213 of the 1926 Act (U. S. C. App., Title 26, Sec. 954), is substantially the same as Section 213 of the Revenue Act of 1924.

SEC. 234. (a) In computing the net income of a corporation subject to the tax im-

posed by section 230 there shall be allowed as deductions:

* * * * *

(8) In the case of mines, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee. (U. S. C. App., Title 26, Sec. 986.)

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a pro-

ceeding in the proper court. (U. S. C. App., Title 26, Sec. 1048.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. App., Title 26, Sec. 156.)

Treasury Regulations 45 (1920 Edition):

ART. 215. *Depletion—Adjustments of accounts based on bonus or advanced roy-*

alty.—(a) Where a lessor receives a bonus or other sum in addition to royalties, such bonus or other sum shall be regarded as a return of capital to the lessor, but only to the extent of the capital remaining to be recovered through depletion by the lessor at the date of lease. If the bonus exceeds the capital remaining to be recovered, the excess and all the royalties thereafter received will be income and not depletable. If the bonus is less than the capital remaining to be recovered by the lessor through depletion, the difference may be recovered through depletion deductions based on the royalties thereafter received. The bonus or other sum paid by the lessee for a lease made on or after March 1, 1913, will be his value for depletion as of date of acquisition.

(b) Where the owner has leased a mineral property for a term of years with a requirement in the lease that the lessee shall extract and pay for, annually, a specified number of tons, or other agreed units of measurement, of such mineral, or shall pay, annually, a specified sum of money which shall be applied in payment of the purchase price or royalty per unit of such mineral whenever the same shall thereafter be extracted and removed from the leased premises, the value in the ground to the lessor, for purposes of depletion, of the number of units so paid for in advance of extraction will constitute an allowable deduction from the gross income of the year in which such payment or payments shall be made; but no deduction for depletion by the lessor shall be claimed or allowed in any subsequent year on account of the extraction or removal in such year of any mineral so paid for in advance and for which deduction has once been made.

(c) If, for any reason, any such mineral lease shall be terminated or abandoned before the mineral which has been paid for in advance has been extracted and removed, and the lessor repossesses the leased property, the lessor shall adjust his capital accounts by restoring to the capital sum of the property the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and his income account shall be adjusted so as to include the amount so restored to capital sum as income of the year such lease is terminated or the property repossessed, and the tax thereon paid.

(d) Upon the expiration, termination, or abandonment of a lease, without the removal of any or all of the mineral contemplated by the lease, the lessor shall be required to restore to capital account so much of the bonus received and deducted from capital recoverable through depletion as is in excess of the actual depletion or loss in value sustained as a result of the operations under the lease and the corresponding amount will be income for the year in which the lease expires, terminates, or is abandoned.

Paragraphs (b) and (c) of the above article appear in the same form in Article 215 of Regulations 62, and Article 216 of Regulations 65 and 69, and in Article 236 of Regulations 74.

Paragraphs (a) and (d) originally appeared in the same form as above in Article 215 of Regulations 62 and Article 216 of Regulations 65, but were afterwards amended by T. D. 3938, V–2 C. B. 117, promulgated November 13, 1926, to read as follows (pp. 117–118):

Article 215 of Regulations 45 (1920 edition), article 215 of Regulations 62, and arti-

cle 216 of Regulations 65 are hereby amended to read as follows:

ART. 216 (215). *Depletion—Adjustments of accounts based on bonus or advanced royalty.*—(a) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of royalties thereafter received.

(b) Where the owner has leased a mineral property for a term of years with a requirement in the lease that the lessee shall extract and pay for, annually, a specified number of tons, or other agreed units of measurement, of such mineral, or shall pay, annually, a specified sum of money which shall be applied in payment of the purchase price or royalty per unit of such mineral whenever the same shall thereafter be extracted and removed from the leased premises, the value in the ground to the lessor, for purposes of depletion, of the number of units so paid for in advance of extraction will constitute an allowable deduction from the gross income of the year in which such payment or payments shall be made; but no deduction for depletion by the lessor shall be claimed or allowed in any subsequent year on account of the extraction or removal in such year of any mineral so paid for in advance and for which deduction has once been made.

(c) If for any reason any such mineral lease shall be terminated or abandoned be-

fore the mineral which has been paid for in advance has been extracted and removed, and the lessor repossesses the leased property, the lessor shall adjust his capital accounts by restoring to the capital sum of the property the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and his income account shall be adjusted so as to include the amount so restored to capital sum as income of the year such lease is terminated or the property repossessed, and the tax thereon paid.

(d) Upon the expiration, termination, or abandonment of the lease, without the removal of any or all of the mineral contemplated by the lease, the lessor shall be required to restore to capital account the excess of the depletion theretofore allowable in respect of the bonus and royalty payments over the actual depletion or loss in value sustained as a result of the operations under the lease, and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned.

All rulings inconsistent herewith are hereby revoked.

Paragraphs (a) and (d) as thus revised appear in Article 216 of Regulations 69 and Article 236 of Regulations 74.

United States Board of Tax Appeals, Rule 50:

Settlement of final determination.—When the Board determines the issues in any proceeding and withholds final decision of the deficiency or overpayment for later computation, the parties shall, if they are in agreement as to the amount of the deficiency or overpayment, in accordance with the determination of the Board, file with the Board

an original and four copies of a computation showing the amount for entry of final decision forthwith. If the parties are not in agreement as to the amount to be entered in the final decision, either of them may file with the Board a computation of the deficiency or overpayment believed by him to be in accordance with the determination of the Board. The clerk will serve a copy thereof upon the opposite party and will thereupon place the matter upon the day calendar for hearing in due course and give the usual notice. If the opposite party fails to file objection, accompanied by an alternative computation, within five days prior to the date of such hearing, or any continuance thereof, the deficiency or overpayment shown in the computation already submitted shall be taken to be correct and decision thereon will be entered. If the parties submit different computations and amounts, they will be afforded an opportunity to be heard thereon on the date fixed, and the Board will determine the correct deficiency or overpayment and enter decision.

Any hearing under this rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such determination or of any new issues. This rule is not to be regarded as affording an opportunity for rehearing or reconsideration.

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